Feature
By **Eleni Lappa**

Reducing expense the right way – best practice in alternative dispute resolution

In cost-conscious times, alternative dispute resolution (ADR) is an attractive option for resolving conflict. However, ADR is not a cost-free solution and needs to be carefully incorporated into current legal practice

Alternative dispute resolution (ADR) is probably better described as a frame of mind, a modus operandi rather than merely a procedural route to resolving a dispute. This is because it may take place at any stage during the dispute, and it depends on the mentality of the parties and their representatives as to whether it will be explored further and allowed to develop with positive results. In broad terms, ADR encompasses arbitration and mediation, but so much more exists within these two processes and concepts, such as negotiation, exchange, approach, compromise, conflict management and settlement.

While most people are at least vaguely familiar with the benefits of ADR (eg, swift resolution, cost savings, control of the process by the parties), there are still certain aspects that will be familiar only to those with extensive hands-on experience of ADR – and more specifically, international ADR. In particular, the following additional advantages are important:

- Conflicts of interest are effectively addressed and eliminated – while conflict of interest rules may differ from jurisdiction to jurisdiction, especially when it comes to judicial systems, in ADR all potential conflicts will be revealed to the parties during the process of selecting their neutral and deciding whether they are comfortable with the arbitrator or mediator who will hear their case.
- Exchange of evidence – while different legal systems have different rules on the exchange of evidence prior to a hearing, ADR offers the opportunity to go directly to the arbitrator and have him or her establish the rules on the submission of evidence in each case, if these have not already been stipulated in the contract's arbitration clause. The arbitrator will usually issue a preliminary ruling on the matter after hearing all parties; hence, the parties still have a means of participating in the formulation of the procedural aspects of things.
- Predictability – ADR is governed by procedural rules that usually operate within specific timeframes at each stage of the process. These are available to the parties from the very outset when the business relationship is initially established by contract, and well before any dispute has arisen. Hence, the uncertainty of the judicial process is replaced by a clear procedural path which allows the parties to feel in control of the process, and may thus encourage them to focus on settlement more than they would in a judicial process that lies outside their immediate control.

Perceived disadvantages – are they valid?

There are few perceived disadvantages to ADR. In practice, those who are unfamiliar with ADR may be fearful or suspicious of the process, for purely psychological reasons, and may thus be reluctant to participate. But some of the reasons which they may cite as explanations for this reluctance are in fact illusory:

- Distance – in international disputes, the parties will often spend no time meeting face to face, except when they go to court and their representatives attend hearings, either as witnesses or as observers. In ADR, the parties in fact will come together much earlier – even before the neutral is appointed – to discuss procedural matters with their case manager. Thus, the bridging of distance between, say, Asia and Europe becomes much more likely in ADR than in litigation. This distance is not merely geographical, of course: there will often be cultural distances that ADR can help to bridge by bringing the parties together, in a collaborative frame of mind, during the initial stages of a dispute.
- Fees – cost is a major concern, especially in the prevailing economic climate, when even major corporations are seeking to keep tight control of their finances and budgetary plans. In reality, filing fees in ADR are very reasonable. The applicable fees usually depend on the amount at stake, follow a progressive scale and are capped at what is generally an insignificant percentage of the claim amount. The costs will also include the neutral's fee for his or her time spent on the proceeding, a factor which is often controlled by the parties in their selection of the neutral. As a further safety net, the parties may also request that the neutral's fees be capped in advance.
- Outcome – the appointment of a neutral who is an expert on the subject matter of the dispute is in itself a good indication that the outcome will be fair and objective, especially as the neutral is chosen by the parties themselves and is often of a third nationality and far removed from any of the parties. With regard to enforcement, the New York Convention 1958 applies in most countries and is further supported by local laws on the enforcement of ADR awards. Thus, if the losing party does not comply with the award – though most often they do – a brief proceeding can take place before the national court (which cannot examine the merits of the award, but only whether it was properly issued) through which the award becomes equivalent to an enforceable court order.

- Lack of exposure – confidentiality is one of ADR's biggest pros. The subject matter of international ADR proceedings is often extremely sensitive. Thus, the guaranteed confidentiality of ADR is a positive benefit when compared to judicial proceedings, when the losing party will suffer further from details of its loss being made public, which in some cases sends a message of defeat to its competitors – a message that remains private in ADR.

Strategies for incorporating ADR into current practice

In most cases ADR – underestimated as it may be in some jurisdictions – is the only available option where the parties wish to remain in charge of the proceedings. Flexible, reliable, consistent and offering full control, ADR is often the answer to even the most puzzling problems or disputes. ADR usually owes its existence to the parties' proactivity when entering into a legal relationship, through the inclusion of an ADR clause in the contract. As a lawyer with 40 years of court experience has said, "A bad compromise is better than any good day in court."

The main challenge is thus where a dispute arises and no ADR clause has been included in the relevant contract. That said, however, persuading a party to submit voluntarily to ADR is not as insurmountable a task as it might first appear, since it is the only available party-driven process for the swift resolution of conflicts. When parties are instructing their legal advisers, they should thus factor this into the equation and select an ADR-friendly lawyer, rather than someone for whom litigation would be a first priority.

ADR becomes an option from the very earliest signs of a potential breach or infringement, when the easiest and most efficient way to resolve the matter is through direct communication between the parties and their legal representatives – a conflict management measure which can translate into huge savings of time, money and energy.

Where the basis of the dispute is a contract, the root of the problem often lies in the purpose of the legal relationship between the parties. While this is not always expressly enshrined in the contract, it can be interpreted through careful consideration of the terms of the contract and the background to the relationship. Of course, as the relationship progresses, its purpose may evolve and may sometimes need to be redefined. At this point, the parties should remain flexible and adaptable, to ensure that any issues that have since surfaced can be addressed and fixed.

Another important factor is the insertion of an ADR clause in any given contract. If the parties have chosen their legal representatives wisely, this will likely be a given, especially in international agreements. The ADR clause requires the parties to submit to ADR in the event of a dispute, no questions asked. The clause should thus be drafted in a specific, tailored manner that affords certainty as to the applicable procedural rules, the number of arbitrators to be appointed (usually one or three), the manner of their appointment and the arbitration hearing location.

Suggestions for greater uptake of arbitration

While in contract-based matters the existence of an ADR clause is a good first start, what happens when non-contractual disputes arise? For example, what if the dispute arises from the infringement of a trademark or patent? Will the rights holder then be in a position to initiate ADR proceedings? The simple answer is yes. Here again, the issue of choosing legal counsel wisely comes into play.

Given that IP disputes are often international in nature, there could in future be scope for the establishment of an international organisation through which parties could participate in ADR electronically. The existence of such an organisation would probably encourage parties to engage in ADR. In the mean time, ADR should be provided for – as an option at least – when registering a trademark or a patent or utility model at the time of filing the first application.

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One option would be to have the World Intellectual Property Organisation administer such arbitrations, as it is already the designated domain name ADR provider for many domains. Another option – and perhaps ultimately a more viable one, albeit initially more challenging – would be to establish local ADR organisations in countries where none currently exist or are active. The panel of neutral arbitrators could be composed of local IP experts, and possibly some international panellists who could work alongside the local experts in applying international principles and norms of IP rights protection. This would add a degree of predictability and certainty which is not always available in national proceedings.

Such an available route for resolving disputes would also ensure that only experts in the IP field were appointed to hear such disputes, and not individuals with only a basic understanding of IP rights – which can be disastrous in practice.

Current state of play

In today's cost-conscious environment, ADR appears to be gaining ground and has evolved into flexible and adaptable processes that can accommodate cultural, ideological and socioeconomic differences between the parties while facilitating swift, easy, cost-friendly resolution.

International ADR proceedings are on the increase as people become more familiar with the associated advantages. Moreover, the panels available at major international institutions are continually improving in quality as their composition is constantly reviewed. Anonymous feedback from ADR participants is further taken into account in order to ensure that panellists' expertise is of the highest possible quality, and that no compromises are being made in terms of morals, ethics or impartiality.

Finally, in contrast to the judiciary, the ADR panels of most institutions are generally made publicly available, thus allowing the parties to select the most appropriate neutral for their case. By having to agree on this initial appointment, the parties are already entering into the proceedings in a spirit of collaboration – which bodes well for the future prospects of success. WTR

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